IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-529

MONTANA POWER COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-585

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-603

ALABAMA POWER COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES AND UTAH INTERNATIONAL, INC., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR PETITIONERS WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES AND UTAH INTERNATIONAL, INC.

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# BRIEF FOR PETITIONERS

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 540 F.2d 1114 and is reproduced in the Joint Appendix at 39a.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1976. This Court granted the petitions for writ of certiorari and consolidated the cases on April 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the Clean Air Act, as amended, 42 U.S.C. §1857, *et seq.*, are set forth in Appendix A to this Brief. The regulations at issue are set forth in the Joint Appendix at 206a and amendments thereto are set forth in the Joint Appendix at 242a, 246a, 284a.

## QUESTIONS PRESENTED[1]

1. Whether the Clean Air Act Amendments of 1970, which provide that the Administrator of the Environmental Protection Agency "shall approve" state plans for the implementation of federal air quality standards which enforce such standards within the State, require him to approve such plans, or whether he may approve

[1] The petitioners' statement of the first question presented is identical to the government's statement of the question presented in *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972, *aff'd per curiam by an equally divided Court, sub nom Fri. v. Sierra Club*, 412 U.S. 541 (1973). The second question presented is taken from the Court's statement of the second question in its order granting certiorari.



only state plans which, in addition, will effectively prevent significant deterioration of existing air quality in any portion of any State.

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction.

## STATEMENT OF THE CASE

The Clean Air Act Amendments of 1970[2] carefully spell out the respective roles of the federal and state governments in achieving the legislative objective of air quality control. Federal authority is vested in the Administrator of the Environmental Protection Agency, who is given the responsibility for issuing air quality criteria[3] and prescribing national primary and secondary ambient air quality standards for each air pollutant for which air quality criteria have been issued.[4]

[2] Pub.L. 91-604, 84 Stat 1705, 42 U.S.C. §1857 *et seq.*

[3] Section 108, 42 U.S.C.§1857c-3

[4] National primary ambient air quality standards are defined as "standards the attainment and maintenance of which in the judgment of the Administrator ... allowing an adequate margin of safety, are requisite to protect the public health...." Section 109(b) (1), 42 U.S.C. §1857c-4(b) (1). A secondary standard is defined as "a level of air quality the attainment and maintenance of which in the judgment of the Administrator ... is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [any air pollutant for which air quality criteria are issued] in the ambient air." *Id.* at subsection (2).

The primary responsibility for implementation of these standards, set by EPA pursuant to statutory direction and authority, is vested in the individual states. The key section is §110,[5] which provides for the submission by each state of a plan for implementation, maintenance, and enforcement of the primary and secondary standards in each air quality control region within the state. Section 110 further provides that the Administrator must approve or disapprove the state plan within four months after submission and, specifically, that "the Administrator shall approve such plan or any portion thereof if he determines that it was adopted after reasonable notice and hearing" and that eight specific statutory criteria are met. None of these criteria has anything to do with air quality better than the secondary standards.

As discussed in this Court's review of the history of federal air quality legislation reaching back to 1955 in *Train v. Natural Resources Defense Council, Inc.* 421 U.S. 60, 63-67 (1975), the 1970 Amendments clearly expanded the role of the federal government "by taking a stick to the states . . . ."[6] It is equally clear, however, that "the Amendments explicitly preserved the principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . .' "[7] This is demonstrated not only by §107, but also by

[5] 42 U.S.C. §1857c-5

[6] 421 U.S. at 64

[7] *Id.* at 64, citing from §107(a), 42 U.S.C. §1857(a) (3) of the 1970 Amendments to the Clean Air Act.



§101(a) (3),[8] by §116, which preserves to the states the right to adopt emission standards or limitations or abatement or control requirements more stringent than those provided pursuant to the Act, and by §118, which requires all segments of the federal government to comply with the requirements of the statute including those set by state and local governments.

In short, Congress took a stick to the states not by removing their responsibility for implementation of EPA's air quality standards, but rather by mandating that the states carry out this responsibility.[9]

State plans for implementation of the national primary and secondary standards were initially submitted some five years ago. Following disclosure by the EPA Administrator to Congressional committees[10] that, in his view, the Act required approval of plans that met the eight criteria specified by §110(a) (2), the Sierra Club and others filed suit in the United States District Court for the District of Columbia seeking to enjoin the Administrator from approving any plans that did

[8] "(a) The Congress finds

* * * * *

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments . . . ." 42 U.S.C. §1857(a) (3).

[9] In the event of failure of state enforcement, §113 provides for federal enforcement. 42 U.S.C. §1857c-8.

[10] Hearings on Clean Air Act Oversight before the Subcommittee on Public Health and Environment of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., ser. 92-105 (1972), at 530-531; Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 92d Cong., 2d Sess., ser. 92-H31 (1972), Pt. 1., at 246-249, 271-276.

not prevent significant deterioration of existing air quality. The District Court held that "plaintiffs have made out a claim for relief"[11] and issued an injunction. The Court of Appeals affirmed per curiam.[12] This Court granted certiorari and, following oral argument, affirmed without opinion by an equally divided Court.[13]

Pursuant to the injunction which was left in effect, the Administrator disapproved the implementation plans of all states insofar as they did not provide for the prevention of significant deterioration[14] and promulgated the regulations at issue here.[15]

Central to the second issue before the Court are the provisions of the regulations dealing with area designation and redesignation. The regulations provide for three classifications of all areas that already meet the federal primary and secondary standards for sulphur oxides and particulates. Classes I and II allow only sharply limited incremental increases in existing levels, while Class III is set at the level of the secondary standards. 40 C.F.R. §52.21(c) (2). Class I is to be used for areas in which "practically any change in the air quality would be considered significant"; Class II is for areas where significant would be more than that "normally accompanying moderate well-controlled growth"; and Class III would allow "deterioration of air quality up to the national standards".[16] All areas are initially designated as Class II.[17]

[11] *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972)

[12] 4 E.R.C. 1815 (1972)

[13] *Fri. v. Sierra Club*, 412 U.S. 541 (1973)

[14] 37 Fed. Reg. 23836 (Nov. 9, 1972)

[15] Though bound to obey the Court's order, the Administrator continued to "adhere to the view . . . that the Act does not require EPA or the States to prevent significant deterioration of air quality," and that he was issuing his regulations only because of "the preliminary injunction issued by the District court." 39 Fed. Reg. at 18986 (July 16, 1973), set forth in the Joint Appendix at 91a.



The states are given the power to propose redesignation of any area, including federal lands within their borders.[18] This redesignation power is subject to certain notice and hearing requirements[19], including notification to "other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected . . . ."[20] The Administrator must approve the redesignation unless he determines that the procedural requirements have not been complied with or that the State arbitrarily and capriciously disregarded specified substantive requirements.[21]

[16] 39 Fed. Reg. 42510

[17] 40 C.F.R. §52.21(c) (3) (1)

[18] Private persons or businesses may not propose redesignations, nor are there any procedures for forcing a state, federal, land manager, or Indian governing body to propose redesignations.

[19] 40 C.F.R. §52.21(c) (3) (ii)

[20] 40 C.F.R. §52.21(c)(3) (ii) (b)

[21] The substantive requirements are contained in 40 C.F.R. §52.21(c) (3) (ii) (d), which provides: "The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and

[Continued]

If the Regulations had granted redesignation authority only to the states, they would approach the distribution of authority between state and federal governments set forth in the statute itself. The statute provides for authority in the states to impose substantive requirements more stringent than the secondary standards mandated by Congress.[22] Under the regulations, this same result could be achieved by the state's redesignation to Class I or permitting the Class II designation to remain in effect. Or, if the secondary standards represent the state's preferred tradeoff between environmental and economic/energy-saving consequences, it could redesignate to Class III. Thus, if the redesignation authority had been limited to the states, the only inconsistency between the division of federal-state authority prescribed by the statute, and that prescribed by the regulations would be (1) the lack of flexibility from pigeon-holing into three classifications, (2) the standard and scope of EPA's review authority and (3) the notice and hearing requirements.

In fact, the departure from the statute is far more serious because redesignation authority does not rest solely with the states. Similar redesignation authority, subject to similar notice and hearing requirements and substantive review by EPA solely for the purpose of determining arbitrary and capricious disregard of the factors cited in footnote 21, *supra*, is also conferred

States, and (3) any impacts of such proposed redesignation upon regional or national interests." The "arbitrary and capricious" standard of review for State redesignations is contained in 40 C.F.R. §52.21(c) (3) (vi) (a).

[22] Section 116, 42 U.S.C. §1857d-1



upon federal land managers[23] and Indian governing bodies.[24] Federal land managers may propose redesignate only to a more restrictive designation; that is, from Class II to Class I in the case of lands that the state has not redesignation, or, where the state has redesignated as Class III, the federal land manager could re-redesignate to Class II or Class I. Indian governing bodies may propose redesignation into any class, except in those cases where the state has "assumed jurisdiction over an Indian reservation . . . ."[25]

[23] 40 C.F.R. §52.21(c) (3) (iv). "Federal Land Manager" is defined by the Regulations: "The phrase 'Federal Land Manager' means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands." 40 C.F.R. §52.21(b) (3).

[24] 40 C.F.R. §52.21(c) (3) (v). "Indian Governing Body" is defined by the Regulations: "The phrase 'Indian Governing Body' means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government." 40 C.F.R. §52.21(b) (5).

[25] 40 C.F.R. §52.21(c) (3) (b). Apparently, the assumption of jurisdiction to which the regulation refers is that which occurs under Public Law 280, 67 Stat. 589, 28 U.S.C. §1360. If the reason for tying redesignation authority to lack of state assumption of jurisdiction under Public Law 280 is to impart some kind of congressional authorization to this scheme, Public Law 280 is not adequate for the purpose. This Court recently clarified in *Bryan v. Itasca County, Minnesota*, 96 S.Ct. 2102 (1976), that that statute had a limited scope insofar as state exercise of power is concerned: "The primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." 96

[Continued]

Either the federal land manager or the Indian governing body, before redesignating, is required to consult with the states in which the federal land or the Indian reservation is located, or which it borders, just as the states are required to give notice to other states, Indian governing bodies, and federal land managers concerning their proposed redesignations. But the authority to redesignate is vested in the federal land managers and Indian governing bodies, and not in the states. This notwithstanding the careful statutory construct which allocates to EPA substantive authority to set primary and secondary air quality standards and to the states both substantive authority to set more stringent standards and primary implementation authority over all standards.

The national primary and secondary standards constitute the limit of EPA's substantive authority to set air quality standards. Section 116 vests in the states the exclusive authority to set substantive air quality standards beyond the primary and secondary standards. This division of substantive and implementing authority between state and federal government is the foundational principle of the Clean Air Act.

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S.Ct. at 2107. With regard to civil jurisdiction, the Court observed that the relevant provision of the statute "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between other Indians and other private citizens, by permitting the courts of the states to decide such disputes . . . ." 96 S.Ct. at 2109. In any event, limiting the redesignation authority of Indian governing tribes to those tribes over whom the states have not assumed jurisdiction under Public Law 280 clearly provides no statutory foundation for the regulation. Congress' decisions concerning authority over air quality standards, and the implementation of those standards, is contained in the Clean Air Act, not in Public Law 280.



Very simply, the administrative creation of a redesignation authority in federal land managers and Indian governing bodies reduces this careful statutory construct to a shambles. There is absolutely no statutory basis for such redesignation authorization. It runs squarely counter to the exclusive authority of the states to set standards more strict than those provided by the Act. Moreover, it adds additional layers of governmental review and results in an administrative authority so fragmented among so many entities that it creates enormous practical difficulties.

Thus, in attempting to grant redesignation authority to Indian governing bodies and federal land managers, the Administrator has not only acted outside the scope of his authority, but has attempted to delegate to non-state governmental entities powers which the statute expressly withheld from federal authority and vested in the states.

## SUMMARY OF ARGUMENT[26]

1. This litigation presents the classic example of problems that are encountered when an administrative agency is forced to attempt to devise regulations in implementation of an assumed purpose that is contrary to the statutory language and structure. The Environmental Protection Agency, the administrative agency charged with the enforcement of this statute, and whose views are therefore entitled to great weight

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[26] For the convenience of the Court, and in the interest of efficiency, these petitioners will summarize their argument concerning the first issue presented, but will not develop that position in the argument portion of the brief; rather, on this issue we will adopt the argument presented by petitioners in these consolidated cases who have addressed that issue.

in matters of interpretation of the statute,[27] has consistently, and correctly, taken the position that the statute does not authorize the Administrator to prescribe air quality standards other than the primary and secondary standards expressly referred to by the Act.[28]

This is also a case in which the legislative history is ambiguous, but the statutory language is very plain. Given the limits of the English language, it would be difficult to express much more clearly the foundational principle that the Administrator sets primary and secondary air quality standards; that each state adopts and submits to the Administrator a plan for the "implementation, maintenance and enforcement" of such standards; and that the Administrator "shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing" and that it meets eight specified statutory criteria, none of which deals with air quality standards other than the primary and secondary standards.

The statute speaks with equal clarity concerning substantive authority to set air quality standards. As to primary and secondary standards, that authority belongs to the federal government and is exercised by the Administrator. But, within the range between the secondary standards and completely uncontaminated

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[27] *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1 (1965).

[28] See footnote 15, *supra*. See also the government's brief in *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972, *aff'd per curiam by an equally divided Court, sub nom Fri. v. Sierra Club*, 412 U.S. 541 (1973).



air, substantive standard-setting authority belongs to the individual states.[29] Enlarging the federal government's substantive authority beyond the authority to set primary and secondary standards effectively eviscerates this additional element of substantive authority which the statute gave to the states, allowing them to adopt substantive standards more stringent than those authorized by the statute.

The statute is explicit. It mandates the setting of primary and secondary standards and vests the authority to set those standards in EPA. More stringent standards may be set, but that decision lies within the authority of the states. Implementation plans for the purpose of carrying out those standards, submitted by the states, must be approved so long as they satisfy eight criteria. Nothing is said of a tertiary standard, or a ninth criterion, and the existence of either would run squarely counter to the language and the structure of the statute. Judicially grafting such a third standard or a ninth criterion onto the explicit language of the statute not only contradicts the plain language of the Act, but also upsets the allocation of authority between federal and state government by transferring to EPA the authority which §116 of the Act expressly grants to the states: the right to make the tradeoff judgments balancing environmental against nonenvironmental considerations, so long as the secondary standards are observed. It is significant that even EPA, the beneficiary of this increased authority, agrees that it is inconsistent with the Act.[30]

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[29] Section 116, 42 U.S.C. §1857d-1

[30] In its brief before this court in *Ruckelshaus v. Sierra Club*, the government stated: "The holding of the courts below is, we sub-

[Continued]

This Court has interpreted the 1970 Amendments to the Clean Air Act on three occasions. Every one of those opinions, *Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Hancock v. Train*, 426 U.S. 167 (1976); and *Train v. Natural Resources Defense Council, Inc.* 421 U.S. 60 (1975), reaffirms that the statute meant what it said when it required the Administrator to approve state implementation plans that meet the eight criteria. While it is true that those cases did not involve the precise issue in this case, all three addressed the "shall approve" requirement of §110 in language that controls this case. The Court in *Hancock* stated, "The EPA was required to approve each State's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in §110(a) (2)."[31]

Similarly, in *Train v. NRDC*, the Court ruled that:

> "Under §110(a) (2) the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a) (2) . . . ."[32]

mit, inconsistent with the careful statutory balance drawn by Congress between federal and state responsibilities, and, if permitted to stand, would substantially impair the prompt and effective implementation of the Clean Air Act Amendments of 1970". Government's Brief, *Ruckelshaus v. Sierra Club*, No. 72-804, OT 1972 pp. 5-6.

[31] 426 U.S. at 170-171

[32] 421 U.S. at 79 (Emphasis in the original).



And in *Union Electric:*

> "This approach is apparent on the face of §110(a) (2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified."[33]

The Act's statement of purpose to "protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population"[34] is the sole asserted statutory authority for the lower court's holding. That statement of purpose is not self-fulfilling. Rather than inferring some assumed implementation of this general objective, consideration must be focused on what Congress actually did to provide for "protection and enhancement". What Congress did is not to be found in some imagined, though unexpressed, emanations from §101, but from the operative provisions of the Act.

Congress provided for the "protection" or maintenance of existing air quality—including air quality already better than that provided by the secondary standards—through two sections of the Act, §111 and §116. Section 111 grants authority to EPA to set performance standards for new and existing stationary sources[35] and further provides for the enforcement of

[33] 427 U.S. at 257

[34] Section 101(b) (1). 42 U.S.C. §1857(b) (1).

[35] Section 111, 42 U.S.C. §1857c-6.

such standards. The legislative history consistently emphasized that this provision was designed to prevent or minimize deterioration of existing air quality.[36]

Additional "protection" for existing clean air areas is provided by §116, which permits the states to adopt air quality standards more stringent than provided by the Act. On its face, §116 necessarily rejects the notion that all substantive air quality standard authority

[36] The President, who first proposed such a scheme, said that it would insure "that levels of air quality are maintained in the face of industrial expansion." 116 Cong.Rec. 32910 (1970). The House Committee observed that it would "prevent the occurrence anywhere in the United States of significant new air pollution problems . . . ." H.Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), at 3. On the Senate side, the Committee reported that "[m]aintenance of existing high air quality is assured through provision for maximum control of new major pollution sources." S.Rep. No. 91-1196, 91st Cong., 2d Sess. (1970), at 2. It was in advocacy of new source performance standards that Senator Muskie contended: "While we clean up existing pollution, we must also guard against new problems. Those areas which have levels of air quality which are better than the national standards should not find their air quality degraded by the construction of new sources." 116 Cong.Rec. 32902 (1970). Senator Randolph, Chairman of the Public Works Committee, urged the Senate to adopt the Conference Report, including "performance standards for new stationary sources, to make sure that no industrial development will degrade the quality of the air so as to endanger public health and welfare, or interfere with or restrain further economic growth." *Id.* at 42392. And Senator Dole observed that "Under this bill, we can continue to encourage the location of new industry in Kansas and other rural unspoiled regions without fear of polluting the high quality of air found there. At the same time, national standards for new stationary sources will not place some states at a comparative disadvantage affecting industry decisions on plant locations." *Id.* at 32923.



would be vested in the federal government. Very simply, if the lower court's judgment is upheld, there will be no range of air quality choices within which the states' statutory authority to adopt standards more stringent than provided by the Act can operate.

Thus, Congress provided for the "protection" of existing air quality through §111 and §116, not through §110. The command of §110 is clear: implementation plans which satisfy the eight criteria must be approved.

The Court of Appeals also placed great emphasis on the legislative history, particularly a passage in the Senate Report stating that "where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality".[37] This and other samples of legislative history fail to sustain the lower court's holding for several reasons.

First, since the statutory language is clear, there is no need to resort to legislative history. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944); *Malat v. Riddell*, 383 U.S. 569, 571 (1966); *United States v. Missouri Pac. R. Co.*, 278 U.S. 269 (1929). The excerpt from the Senate Report consists of a single sentence from a 129 page report. It is not found either in the House Report or the Conference Report. There are other pieces of legislative history upon which the lower court relied, but as noted

[37] S.Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970)

above,[38] there are equally persuasive segments of legislative history that favor the petitioners' position. There is no such ambiguity in the language of the statute. This case is therefore a classic illustration of the well-settled rule that where the statutory language is clear, there is no need to resort to legislative history.

Second, the provisions of the legislative history on which the lower court relied are no more self-fulfilling than is the "protect and enchance" language of §101. What Congress did to insure that implementation plans provide "to the maximum extent practicable, for the continued maintenance of such ambient air quality" is found not in some inference from the legislative history, but in the operative provisions of the statute. "The continued maintenance of ... air quality" already cleaner than the secondary standards is provided by §111, dealing with stationary source controls, and by §116, which authorizes the states to adopt more stringent standards.

Thus, the content of the generalized "protect and enhance" objective, as well as the fulfillment of the snippets of legislative history relied on by the lower court can be found only in the specific provisions of the Clean Air Act.

2. The Court of Appeals held that the issue of the Administrator's statutory authority to grant redesignation authority to federal land managers and Indian governing bodies is not ripe for adjudication. The Court of Appeals erred in this holding.

EPA promulgated these regulations as identical implementation plans for each state. If the holdings of

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[38] See footnote 36.



four Circuit Courts of Appeal and numerous district courts concerning the exclusivity of §307 of the Clean Air Act as a means of review of implementation plans is correct, then it is not only appropriate to review all aspects of the Administrator's regulations at this time, but such review at any other time would be foreclosed. The Court need not even reach the issue whether §307 provides the exclusive means for review of state implementation plans, however, because under general principles dealing with ripeness of federal regulations for judicial review this case is clearly ripe. The issue presented is purely legal. The agency action is final within this Court's decisions on that issue. Most important of all, the regulations will have a "direct and immediate impact" not only on the parties to this litigation, but also on important national interests.

On the merits of the second question, Congress has provided careful and detailed divisions of authority and responsibility between federal and state governments, with substantive authority in the Administrator to set primary and secondary air quality standards, substantive authority in the states to set air quality standards more stringent than the secondary standards, and authority in the states for the implementation, maintenance, and enforcement of the substantive standards.

The foundation stones of this carefully fitted federal-state structure have been abruptly removed by the Administrator's creation of a redesignation authority in federal land managers and Indian governing bodies. This has been accomplished without any statutory authority and, indeed, contrary to several statutory provisions.

The practical implications of this administrative rearrangement of the statute are as important as its theoretical ones. The principal impact of the significant deterioration regulations will be in the western United States. This is also an area of the country that consists of a checkerboard of federal, Indian, state, and private land. The Administrator has correctly observed that redesignation as Class I could effectively control growth and development not only within the redesignated area, but also within a distance of sixty to one hundred miles of that area. Vesting redesignation authority in federal land managers and Indian governing bodies will deprive the states of their statutorily conferred rights to make choices concerning trade-offs between air quality on the one hand and energy conservation and economic considerations on the other. Because of the 60-100 mile overreach, this deprivation will apply to virtually all of the eleven western states, including lands that are neither federal nor Indian.

## ARGUMENT

1. *Ripeness of Redesignation Issue*

Interests and policies that are of immediate importance not only to these parties, but also to the nation as a whole, require that this second issue on which the Court granted certiorari[39] be decided at this time.

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[39] The Court's characterization of the second question as to which certiorari was granted as set forth in the Questions Presented, *supra*, p. 2, might imply that the Court agrees that ripeness is not an issue in this case. Because ripeness was the basis for the lower court's judgment on the redesignation issue, however, we will treat it briefly.



The Clean Air Act contains its own judicial review procedures. Under §307(b)(1)[40] petitions for review of certain actions of the Administrator—including approval or promulgation of implementation plans—must be filed within 30 days from the date of promulgation or approval. Four Circuit Courts of Appeal, the Third, Seventh, Ninth, and Tenth, as well as numerous federal district courts, have held that §307 is the exclusive means by which implementation plans may be reviewed.[41] The regulations here at issue were promulgated under §110c-5(c)[42] as identical implementation plans for each state to prevent significant deterioration of air quality. The consolidated cases before the Court were originally filed as petitions for review under §307. Under the holdings of the cases cited above, therefore, judicial review of these regulations at this time is more than appropriate; if these regulations are to be reviewed at all, it must be in an action filed under §307 within thirty days of their promulgation.

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[40] 42 U.S.C. 1857h-5(b) (1)

[41] *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973); *Plan for Arcadia, Inc. v. Anita Associates*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Utah Internat'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973); *Anaconda Company v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973); *Pinkney v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 309 (N.D. Ohio 1974); *Arizona Public Service Company v. Fri*, 5 E R C 1878 (D. Ariz. 1973); *Hagedorn v. Union Carbide Corporation*, 363 F. Supp. 1061, 1068 (N.D. W.Va. 1973); *Delaware Cit. For Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1046 (D. Del. 1973), *aff'd* 510 F.2d 969 (3d Cir. 1975).

[42] 42 U.S.C. §1857c-5 (c)

This case may not be the most appropriate vehicle for ruling on the exclusivity of §307 as a means of judicial review of implementation plans. Fortunately, that issue need not be resolved in this case because, under general principles of ripeness applicable to judicial review of federal regulations, review of these regulations is clearly appropriate at this time.[43]

The rules dealing generally with the ripeness of federal regulations for judicial review are illustrated by three cases decided the same day, all involving regulations of the Food and Drug Administration. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967); and *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967). The underlying rationale and the two-fold test for ripeness were summarized by the *Abbott Laboratories* opinion:

> "Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its

[43] It should be noted, however, that if the Court should disagree with petitioners' view concerning the general rules dealing with ripeness, then the question whether §307 provides the exclusive means for review of state implementation plans (and the apparent conflict between the District of Columbia Circuit and the Third, Seventh, Ninth, and Tenth Circuits on this issue) would have to be decided in this case, because if those circuits which hold that review under §307 within thirty days of promulgation is correct, then this case is not only *an appropriate time* to review the regulations, it is *the only time* that such review can be had.



> effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[44]

The Court held that two of the cases, *Abbott Laboratories* and *Gardner v. Toilet Goods Association*, were ripe for adjudication, but that the third, *Toilet Goods Association v. Gardner* (on which the Court of Appeals relied) was not ripe. Analysis of those three opinions compels the conclusion that the second issue in this case should be decided by this Court at this time.

In the instant case, as in all three of the FDA cases, the issue is purely legal. It is also, we submit, an issue as to which the agency action is final within the holdings of this Court in the FDA cases and also *Frozen Food Express v. United States*, 351 U.S. 40 (1956); and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The finality concern appears to be the basis for the Court of Appeals judgment on this issue, that Court observing that, "if the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted the federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise." Joint Appendix 87a. With all due respect, this amounts to nothing more than an assertion that the Administrator might reverse his position. These regulations have been officially promulgated. They grant to federal land managers and Indian governing bodies the powers whose legality is the substantive

[44] 387 U.S. at 148-49

issue in this case. There is no indication, either in this record or anywhere else, that the Administrator did not mean to do what he did in these regulations, or that he now intends to change his mind, or that such a change would escape challenge.

Even more important, the three FDA opinions clearly reveal that the controlling factor distinguishing *Abbott Laboratories* and *Gardner v. Toilet Goods Association*—which were held to be ripe—from *Toilet Goods Association v. Gardner*—which was not—was "the degree and nature of the regulation's present effect on those seeking relief".[45] The regulation at issue in *Toilet Goods Association v. Gardner*, the unripe case, provided for suspension of certification service to any firm that refused to permit FDA employees certain access to that firm's facilities, processes, and formulae. The Court in that case observed: "This is not a situation in which primary conduct is affected —when contracts must be negotiated, ingredients tested and substituted, or special records compiled."[46]

By contrast, the regulation in *Abbott Laboratories*, requiring drug companies to print on the label the established name of certain drugs every time the proprietary name was employed, had a "sufficiently direct and immediate [impact] as to render the issue appropriate for judicial review at this stage." 387 U.S. at 152. This "sufficiently direct and immediate impact" was explained by the Court:

> "If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies."[47]

Similarly, *Gardner v. Toilet Goods Association*, involved, *inter alia*, a so-called "patch test" exemption from the statutory color additive provisions. The Toilet Goods Association contended that the Administrator had exceeded his statutory authority in restricting the patch test exemption. The issue was ripe for review because:

> "... [I]t is quite clear that if respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial."[48]

The rule that emerges from analysis of the three FDA cases is quite clear: the free access regulations in the unripe case, *Toilet Goods Association v. Gardner*, did not affect "primary conduct" such as the negotiation of contracts, the testing or substitution of ingredients, or the compilation of special records. The other two cases did require "primary conduct." In the one case, labels and promotional materials would have to be changed, and in the other, substantial amounts of paperwork, scientific testing, and recordkeeping would be implicated.

The conduct necessitated by the FDA regulations in *Abbott Laboratories* and *Gardner v. Toilet Goods* is pale by comparison to this case. The unlawful grant of

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[45] *Toilet Goods Association v. Gardner*, 387 U.S. 158 at 164

[46] 387 U.S. at 164

[47] 387 U.S. at 152

[48] 387 U.S. at 173

authority to Indian governing bodies and federal land managers has created a veto power over energy development, especially in the western United States served by these petitioners. It also creates the potential for abuse of such power by an entity that proposes a redesignation for purposes other than the merits of the proposal, e.g. to exert leverage over a private company or a nearby governmental entity. EPA itself recognizes the potential for this kind of abuse.[49]

The very existence of that veto power has a concrete, impeding impact on planning, investment, and development for meeting energy needs.[50] The dollar value of that impact is many times greater than was involved in the labels, advertisements, printing type and supplies in the FDA cases. These petitioners have existing plants, plants under construction, and plants

[49] A "Guidance Memorandum" on the regulations from the Assistant Administrator of EPA to all Regional Administrators dated September 18, 1976, reveals the pervasive impact of the federal and Indian authority. The full text of the Memorandum appears in 7 BNA Env. Rptr., No. 23, at 859 (Oct. 8, 1976), and is reproduced in pertinent part as Appendix B of this brief. The discussion of potential abuse of redesignation authority appears at pp. 3b-4b of Appendix B.

[50] The Northern Cheyenne Indian Tribe recently proposed redesignation of its reservation in Montana as a Class I area. On April 29, 1977, EPA published its proposed approval of the redesignation and solicited comments on whether the Tribe had satisfied two procedural criteria. (42 Fed Reg. 21819) The proposed action is supported by both the Department of the Interior and the state of Montana. However, the redesignation is opposed by the neighboring state of Wyoming, the Crow Indian Tribal Council, whose reservation borders on the Cheyenne's, and the

[Continued]



in the planning stages. Planning for all of these facilities, including assurance of adequate coal supplies, cannot proceed properly, pending resolution of the conflicting jurisdictions of the states, Indian tribes and various federal agencies. Site selection and planning for electric generation plants involves years of effort and many millions of dollars. Petitioners cannot risk such expenditures of time and money on planning and preparing a plant site only to have the site or its fuel source eliminated by redesignation by an Indian tribe or manager of federal lands sixty to one hundred miles distant from the site.[51]

Even more serious — and immediately pressing — is the import of this issue to national policy. In his address to a joint session of Congress on April 20, 1977, the President has reminded us that the current energy problems constitute "the greatest domestic challenge

Montana Power Company, a petitioner in this action. The Crow Indians oppose the redesignation because it would limit their options for developing their own coal deposits; Montana Power Company opposes the redesignation because it would block construction of two power plants planned for the area; the State of Wyoming opposes the redesignation because it would effectively limit the development of northern Wyoming by determinations of the Tribe, Montana and the federal government, when such growth determinations belong to Wyoming as a matter of constitutional right.

[51] In the Guidance Memorandum, cited in footnote 49, the Administrator directed that, even where a governing body merely "announces consideration" of a possible reclassification, EPA approval of a *previously* filed application for a construction permit must be withheld pending (and depending upon) EPA action on the reclassification; and this is true even where the proposed source is not to be constructed within the political boundaries of the body considering reclassification.

our nation will face in our lifetime."[52] He has also challenged the Congress and the American people that "our plan and our goals for 1985" include a goal "to increase our coal production by more than two-thirds, to over one billion tons a year."[53] Among the significant contexts in which increased use of coal can relieve our dependence on petroleum products are electric generation, coal gasification, and coal liquification. The lead time for that kind of conversion — to whatever extent it is to occur — is measured in years.

This and other aspects of the President's energy message pose difficult policy decisions, necessarily implicating not only energy but also environmental issues and the inter-relationships between them. These are decisions facing two of the branches of our government, Congress and the President, pursuant to their joint constitutional responsibility to make law. But, in that kind of setting, with many billions of dollars and the welfare of future generations at stake, the occasion is hardly appropriate for the third coordinate branch to decline to function in its assigned constitutional role: the interpretation of already existing federal statutes.

2. *Legality of Redesignation Authority in Federal Land Managers and Indian Governing Bodies*

Throughout the 1970 Amendments to the Clean Air Act, Congress gave rather specific content to the general finding in §101, "that the prevention and control

[52] Press Release, Text of an Address by the President to a Joint Session of Congress on Energy, April 20, 1977, p. 1.

[53] *Ibid.*



of air pollution at its source is the primary responsibility of states and local governments".

Section 107(a)[54] provides:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality region in such State."

The submission and adoption of implementation plans referred to by §107 are treated with greater detail in §110[55] which provides that "Each State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement . . ." of the national primary and secondary ambient air quality standards set by the Administrator. Section 110 further provides that "the Administrator shall approve such plan or any portion thereof, if he determines that it was adopted after a reasonable notice and hearing . . ." and that it meets eight specified criteria. The eight criteria deal with attainment of the national and primary standards, but make no mention of air quality standards other than the primary and secondary standards.

The general statutory scheme is to vest substantive standard setting authority in the federal government, specifically EPA, and the implementation, maintenance, and enforcement authority in the states. There is one departure from this general pattern: the states

[54] 42 U.S.C. §1857c-2

[55] 42 U.S. §1857c-5

are given substantive authority to adopt air quality standards, or emissions limitations, (or control or abatement requirements) more stringent than required by the Act.[56] The purpose of this provision is clear. Up to the level of the secondary standards, the states are given no choice. Congress mandated the attainment of that level of air quality within the time limits set by the Act, through the medium of state implementation plans. Throughout the Nation, air quality represented by the secondary standards was not optional, but mandatory.

Up to the air quality level represented by the secondary standards, then, the states have no option. But within that incremental range between the secondary standards and air which is pollution-free, the Act gives states the leeway to make their own policy choices concerning the tradeoffs between air quality on the one hand and, on the other, economic development, energy conservation through greater use of coal, and similar considerations. Such issues are among the most difficult and the most important facing governments at all levels. Section 116 of the Clean Air Act did not attempt to answer all of these questions. It did answer some: to the level of the secondary standards, economic considerations, energy conservation considerations, or any other considerations — no matter how weighty — are not to be balanced against considerations of air quality control. Up to that level, Congress has already made the balance. But within the range beyond the secondary standards, the issue is not a closed one. Within this dynamic area involving public policy issues of the greatest possible magnitude,

[56] Section 116, 42 U.S.C. §1857d-1



Congress has left the policy options open, for each state to exercise, according to its own particular needs.

Finally, §118 of the Act[57] provides that "each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government ..." shall comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This necessarily means that all components of the federal government are subject to the states' substantive authority to set standards more strict than the secondary standards, and also subject to state powers of implementation, maintenance, and enforcement, pursuant to approved implementation plans. In *Hancock v. Train*, 426 U.S. 167 (1976), this Court held that EPA is not required to obtain permits from the State of Kentucky, as provided in that State's implementation plan. But the Court made it very clear that all federal entities are required to conform to state air pollution standards, limitations, and compliance schedules. In the language of the Court:

> "The parties rightly agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules. With the enactment of the Amendments in 1970 came the end of the era in which it was enough for federal facilities to volunteer their cooperation with federal and state officials."[58]

[57] 42 U.S.C. §1857f

[58] 426 U.S. at 181

The Clean Air Act grants authority to two governmental groups: The Environmental Protection Agency, and state and local governments. No other authority is granted. No other authority is intended. And it would be inconsistent with the structure of the statute for any other authority to be created. The reason is that the statute itself allocates all substantive authority so that none is left to allocate. Standard setting authority to the secondary level is in the federal government. Standard setting authority beyond the secondary level is in the states.

Subdivisions iv and v of §3 of §52.21 of the Administrator's regulations, purporting to vest reclassification authority in federal land managers and Indian governing bodies, amounts to nothing less than removal of the foundation stones from the statutory structure allocating substantive and enforcement authority between federal and state governments. There is virtually no aspect of the statutory allocation that is left untouched. Wholly aside from the legality, as a general matter of delegation doctrine of one administrative agency redelegating statutory authority to another, the controlling fact is that, in this case, such redelegation amounts to nothing less than re-writing the statute.

There is no language in the Act which, either expressly or by implication, allows the special treatment of federal and Indian lands within a State. But, in withdrawing reclassification of lands from state control, these regulations affect not only those federal and Indian lands themselves, but neighboring state and private lands as well. This is because the construction or modification of a source covered by the regulations will not be permitted if the effect of that source on air



quality concentrations will cause a violation either of the air quality increments applicable in the immediate area or the increments applicable in any other areas.[59] EPA itself has emphasized the dramatic effect of this provision:

> "Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for $SO_2$ could under some conditions violate the Class I increment for $SO_2$ 60 or more miles away.... Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extend well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other .... [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment."[60]

EPA acknowledged that this "drift factor" could limit growth outside a Class I area as much as 60 to 100 miles.[61] The reclassification of federal or Indian lands can dictate growth and development on adjacent state and private lands for many miles around.

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[59] 40 C.F.R. §52.21(d) (2) (i)

[60] 39 Fed. Reg. 42512 (Dec. 5, 1974), set forth in the Joint Appendix at 218a, 19a.

[61] *Id.* at 42513, Joint Appendix at 220a

By allowing federal and Indian lands to be reclassified independently of state control, the regulations treat those lands differently from all other lands in the states and grant to federal land managers and Indian governing bodies a decision-making power equal to that of the states themselves. It is in fact a power that supersedes and supplants the power that the statute grants to the states.

Insofar as the prevention of significant deterioration is concerned, there is nothing inherent in the nature of air quality above federal or Indian lands which *per se* should remove its protection from state control. Even if there were, that judgment has been made by Congress; it was not left to EPA. Section 118 explicitly provides that federal lands and entities shall be subject to the same state and other requirements as other persons within the state. Similarly, with regard to Indian lands and entities, it is well settled that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. . . ."[62] Since the Clean Air Act contains no special provisions for Indian tribes, they are subject to all the provisions of the Act, including those granting the states the responsibility and authority, subject to EPA's supervision, for implementing the Act within their borders.[63]

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[62] *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960)

[63] Several petitioners below argued that the regulations in question violated rights of due process under the United States Constitution. The allocation of the responsibility for reclassification of Indian lands by Indian governing bodies and the "reach" of such reclassifications beyond the Indian land borders certainly

[Continued]



In short, by granting federal land managers and Indian governing bodies a decision-making power seperate from that of the states, EPA has purported to grant authority which the Act does not give it to grant. It has also attempted to confer that authority on political entities whom the Act did not intend to have such authority.

EPA's explanatory comment suggests that creating this redesignation authority "ensures that national forests and parks can be protected by the federal government from deterioration of air quality."[64] Whatever the merits of that argument as a policy matter, it should be addressed to Congress. Congress has already decided that issue, and only Congress can change what it has done. The primary responsibility for assuring air quality within "the entire geographic area comprising such state" was conferred on each state by §107(a) of the Act, and §118 further declared that each segment of the federal government must comply with state standards. Any doubt on that subject was dispelled by *Hancock v. Train*, 426 U.S. 167, 181 (1976), wherein this Court observed, "The parties

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raise due process type issues. While petitioners could seek judicial review of a federal land manager's actions or that of a state in federal or state courts, respectively, there is no judicial forum in which to review the Indian governing body action. Judicial review of the actions of Indian tribes under these regulations would only be available in the narrow sense of seeking review of EPA's approval of any designation under the "arbitrary and capricious" standard. The Court did not grant certiorari on the due process issue. Nevertheless, the adequacy of available review procedures is relevant to the legality of the redesignation regulations. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

[64] Joint Appendix, at 222a

rightly agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules."

The power granted federal agencies and Indian governing bodies creates particularly severe problems in the eleven western states served by petitioners because of the extensive amounts of federal and Indian lands and checkerboard land ownership patterns in those states.

This fact is poignantly demonstrated by the Northern Cheyenne Indian Reservation redesignation, discussed in footnote 50, *supra*, and graphically illustrated by the United States Geological Survey Map appended to this Brief, showing federal land ownership within the United States. Analysis of that map discloses that, except for portions of northeastern Colorado and northeastern New Mexico, there is no place in the eleven western United States that is located sixty miles from Federal or Indian Reservation land. Extending the range to one hundred miles leaves unaffected no part of the State of New Mexico and, in Colorado, only a tiny triangle (measuring about eight miles to the side) along the Kansas border. Indeed, within the vast area south of a line that runs from the Montana-Wyoming border to the Columbia River, east of the Sierra Nevadas, north of the Mexican border, and west of the Rockies' eastern slope, there is no spot that is as much as twenty miles from Federal or Indian reservation land. Thus, within the eleven western states — the area in which these regulations will have their principal impact — the statutory authority of the states to set their own substantive standards so long as they meet the primary and secondary standards has been forfeited by regulatory fiat.



Several of petitioners' electric generating plants and coal mining operations are located in the Four Corners Area of Arizona, Utah, Colorado and New Mexico. Within 60 to 100 miles of the existing and proposed plants within the New Mexico portion of the Four Corners region there are four Indian reservations, two national monuments, three national forests, thousands of acres of federal public domain, as well as three other states.[65] The delegated authority to New Mexico to redesignate becomes of little value under these circumstances, since one of the considerations is the effects of the proposed redesignations on adjoining areas which include differing Indian governing bodies and differing federal land managers, each having the power of reclassification.

A protest by any one of the multiple federal land managers of Indian governing bodies limits the circumstances under which EPA can approve the reclassification. Moreover, each can initiate its own reclassification, though the federal agencies only to a more restrictive class. This hodgepodge of conflicting "sovereigns" utterly ignores the primary role for the state in which the sources are geographically situated, and instead creates a maze of potential vetoes for en-

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[65] According to the Energy Committee of the New Mexico Legislature 1976, a "recent study on the northwest coal fields in New Mexico conducted by the State Geologist showed that coal ownership was 57.3 percent federal, 32 percent Indian, 5.9 percent private and 4.8 percent state." See also Southwest Energy Study, Department of the Interior, April, 1972 at pp. 3-1 to 3-5, which shows the division of ownership of coal in the five southwestern states [Wyoming, Utah, Colorado, Arizona, New Mexico] to be as follows: 45 percent federal, 13 percent Indian, 17 percent private, 13 percent state, 12 percent railroads.

ergy development that inhibits, if not curtails, petitioners' plans to meet the near and long-term energy crisis.

It is not a sufficient answer that the redesignation regulations give the states most of the authority that they were given by the Act (and that EPA agrees they were given by the Act), i.e., authority to determine for themselves the air quality within their own boundaries, so long as it is at least as clean as required by the secondary standards. The reason that this answer is insufficient is because it is incorrect. If the regulations had granted redesignation authority solely to the states, they would have substantially replicated the division of substantive authority between federal and state governments provided by the statute. That is, the federal government, through EPA, would set the primary and secondary standards but, beyond the secondary standards, substantive authority would be vested in the states. States electing standards higher than the secondary standards could either redesignate to Class I, or permit the Class II designation to remain. Those who preferred the secondary standards could redesignate to Class III. In fact, the regulations do not grant redesignation authority only to the states. Instead, they create a veto power in federal land mangers and Indian governing bodies. It is a veto power which, because of the "drift factor" and the checkerboard pattern of land ownership within the western United States, gives these federal land managers and Indian governing boards exactly what the statute gave to the states: the authority to determine whether, and to what extent, air quality will be better than that provided by the secondary standards.[66]

[66] See footnote 50.



Neither is it a sufficient answer that the regulations require federal land managers and Indian governing bodies to "consult" with the states in connection with redesignations, and that the redesignations are subject to EPA review. Manifestly, the right of consultation is not equal to the right of decision. What the statute has given, the regulations have taken away.

Review by EPA does not save the illegality. The standard of review is to determine arbitrariness and capriciousness. Even more important, EPA's authority to review a redelegation that it had no authority to make in the first place is hardly an adequate bootstrap for the creation of such authority.

The short of the matter is that EPA has attempted, under the guise of redesignation, to transfer to non-state entities authority that the statute granted to the states. No amount of consultation nor review to determine arbitrariness and capriciousness can cure that defect.

## CONCLUSION

A single principle resolves both issues in this case.

That principle is judicial fidelity to the language of the statute. The legislative history offers something for both sides of the non-degradation issue, but there is no ambiguity in the statutory language. "Shall approve" means "shall approve" and three times this Court has said that the language of §110 precludes consideration of any factors other than those specified.

If EPA had not been enjoined from implementing the Clean Air Act as EPA interprets the Clean Air Act, the redesignation issue would never have arisen. Also, if redesignation authority had been granted only to the states, then redesignation would have substantially reinstated what the Act originally granted: authority in the states to control the extent to which air quality will exceed the secondary standards.

The solution, of course, is to return to the original statutory construct: (1) substantive authority and responsibility in EPA to set primary and secondary air quality standards, (2) substantive authority in the states to set other air quality standards, and (3) authority and responsibility in the states for the implementation, maintenance, and enforcement of the standards.

The judgment of the Court of Appeals for the District of Columbia must therefore be reversed.



Respectfully submitted,


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# APPENDIX

## APPENDIX A

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

### § 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extends into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

**§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan**

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

**§ 1857d—1. [§ 116.] Retention of State authority**

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857f—6c(c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or



limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

**§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities; compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the

United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7 (c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

* * * *

**§ 1857h—2. [§ 304.] Citizen suits—Establishment of right to bring suit**

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or



(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

* * * *

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * * *

**§ 1857h—5. [§ 307.] Administrative proceedings and judicial review**

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(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1(b) (1) of this title), any determination

under section 1857f—1(b) (5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

## APPENDIX B

The following Memorandum appears in 7 BNA Environmental Reporter, No. 23, at 859 (Oct. 8, 1976).

ENVIRONMENTAL PROTECTION AGENCY GUIDANCE MEMORANDUM ON SIGNIFICANT DETERIORATION REGULATIONS — DATED SEPTEMBER 28, 1976.

SUBJECT: Additional Guidance on Prevention of Significant Deterioration (PSD) Regulations

FROM: Roger Strelow
Assistant Administrator
for Air and Waste Management (AW-443).

MEMO TO: Regional Administrators

Questions arising from the Regions have indicated the need for further headquarters guidance on various aspects of the PSD regulation (40 CFR 52.21).

A. Several questions relate to 40 CFR 52.21 (d) (5), which reads as follows:

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

The purpose of paragraph (d) (5) is to insure that while a governing body is seriously pursuing the redesignation of an area to Class I, the redesignation will not be compromised or nullified by a new or modified source. I would like to stress several basic points about this provision:

1. The issue of which was first in time — the source's permit application or the governing body's announcement of redesignation consideration — is irrelevant under paragraph (d) (5). If the governing body announces such reconsideration any time before a final permit has been issued, paragraph (d) (5) will be triggered.

2. A proposed source need not be located within the political boundaries of the governing body considering the redesignation in order for paragraph (d) (5) to apply. If the source's emissions could pose a threat to the proposed redesignation, then final permit approval would have to be withheld pending EPA's action on the proposed redesignation.

As is true of most aspects of the PSD regulations, the Regions will have to exercise their sound judgment on a case-by-case basis in determining whether a proposed source would be located far enough from the political boundaries of the governing body so as not to pose a threat to the proposed redesignation. This type of judgment should not present novel problems for the Regions, since the PSD regulation ultimately requires (in paragraph (d) (2) (i)) a finding that a source will not violate the applicable increments in any surrounding areas.



I realize that one could read paragraph (d) (5) in a very literal fashion to apply only to sources which would be constructed within the political boundaries of the governing body considering the redesignation. This interpretation would, however, do violence to the basic purpose of the PSD regulation (which is to insure that applicable air quality increments are not violated by new sources, without regard to the political boundaries a source might choose to locate within), and would do violence to the basic intent of paragraph (d) (5) (which is to insure that a pending redesignation will not be jeopardized by a new source).

3. Paragraph (d) (5) will be triggered even where a governing body "announces consideration" of a proposed redesignation. There is good reason for allowing such an early triggering event, since EPA regulations and guidelines require the governing body to go through several procedural steps (including detailed document preparation) before the redesignation can even be formally proposed. If this approach were not taken, then a governing body which was actively and expeditiously endeavoring to secure a redesignation could still find the redesignation compromised or nullified by an intervening permit approval.

We must recognize, however, the potential for abuse in such a case and take care to guard against it. The clause must not operate to allow a governing body to frustrate construction of a source if that governing body does not seriously intend to pursue a redesignation or does not pursue it actively and expeditiously.

Therefore, whenever a governing body announces it is considering a redesignation,[1] and that announcement would affect a proposed source's application, EPA should make clear to the governing body (in writing) that new source approvals will be withheld only so long as the governing body is actively and expeditiously proceeding towards redesignation. EPA should set forth a reasonable schedule of action considering all the circumstances of each case[2] and notify the governing body that any significant departure from that schedule, or any other evidence that the governing body is not actively and expeditiously pursuing redesignation, would be considered grounds for EPA to suspend the operation of paragraph (d) (5) and complete action on permits being withheld.

Such a suspension of paragraph (d) (5) should not occur automatically upon the failure of a governing body to meet a given deadline. Again, all relevant circumstances would have to be weighed.

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[1] No special form of "announcement" is required. Any evidence that the governing body, or an appropriate official thereof, has seriously determined to consider redesignation and has communicated this determination in writing to EPA should suffice. In any event, as discussed in the text above, the form of announcement is not nearly as important as the governing body's follow-up actions in determining whether paragraph (d) (5) should hold up a permit.

[2] *I.e.*, type of governing body (State? Indian Tribe?), number of potentially-affected jurisdictions, number of other govermental approvals needed, size of area affected, etc. It would probably be wise to develop this schedule in consultation with representatives of the governing body.



For instance, if a delay were caused through no fault of the governing body, it would probably be improper to suspend paragraph (d) (5). The main point is that EPA must remain satisfied that the governing body is doing all that can reasonably be expected to process the redesignation actively and expeditiously.

4. Paragraph (d) (5) only restricts EPA from granting permit *approval* while a redesignation is pending. A Region may therefore carry out all other provisions of paragraphs (d) and (e) in this period (*if* it chooses). This might have the salutary effect of "keeping the heat" on the governing body to complete its redesignation procedures. It might also, however, constitute in a Region's judgment an unwarranted diversion of resources for a permit which may never be issued. The Regions should use their own judgment in this area.

5. A Region may grant a permit pending a redesignation if the Region determines that the source would not violate the increments which would result from the redesignation.

6. When a potential applicant contracts a Region about initiating the permit process, the Region should make the applicant aware of the implications of paragraph (d) (5) so that the applicant may be encouraged to complete its application expeditiously. Obviously, whenever paragraph (d) (5) is triggered, the Region should immediately notify those whose permit applications will be affected.

B. A question has been raised concerning the applicability of the PSD regulations to certain

kinds of coal cleaning plants [§52.21 (d) (1) (ii)], specifically those that do not utilize a thermal dryer. Although the wording of the proposal of §52.21 (d) (1) (ii) read "coal cleaning plants (thermal dryers)" the final regulations read simply "coal cleaning plants." Region VIII has recently interpreted the PSD regulation to cover all coal cleaning plants, regardless of whether a thermal dryer is used. Region VIII's interpretation is correct.

C. One Region has questioned whether a PSD permit can be conditioned to require emission control that goes beyond best available control technology (as when a power plant intends to use low sulfur coal and a flue gas scrubber and will be well below the NSPS for $SO_2$ from power plants). Unless it is necessary to meet the applicable air quality increment, we can not *require* a source to go beyond BACT. However, should a source indicate on its permit application that its emissions will be less than that which we would ordinarily define as BACT, the lesser emission rate may be made an enforceable condition of the permit. The legally enforceable emission rate should be used for purposes of keeping track of the unused portion of the increment. Obviously, the situation where actual emissions are less than the legally enforceable emission rate presents the potential for a source to "hoard" a major portion of the remaining increment for future expansion. Therefore, where a source will go beyond BACT, Regions should attempt to make the lesser emissions a legally binding permit condition.



D. Finally, some Regional Offices have requested a change to the PSD regulations enabling the Regional Administrator to require the applicants to perform the necessary diffusion modeling. We feel, and OGC concurs, that adequate authority to require such analysis is presently provided under §52.21 (d) (3), which indicates that EPA can require a source to submit "... information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels ...".

cc. Regional Counsels
Regional Air Directors
Regional Enforcement Directors